WISCONSIN LEGISLATIVE COUNCIL
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CLEARINGHOUSE RULE 02−062

Comments

[NOTE: All citations to "Manual" in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

Section 287.11 (4) (a) 1., Stats., directs the department to set goals for the amounts of materials to be recycled under the pilot program for alternate methods of compliance as a percentage of solid waste generated in the geographic area served by a responsible unit. The reference in subd. 1. to the "materials to be recycled" appears to refer to the materials referenced in the first sentence in s. 287.11 (4) (a) (intro.), Stats. This provision directs the department to administer a pilot program that provides an alternate method of compliance with s. 287.11 (2) (b), Stats. Paragraph (b) is a required component of an effective recycling program which directs occupants of single-family residences, buildings containing two or more dwelling units and commercial, retail, industrial, and governmental facilities in the responsible unit's region, to separate materials subject to the 1995 landfill and incineration bans from post-consumer waste generated in the region.

Thus, under this reading of the statutes, the goals for the pilot program should be based upon all of the materials to be recycled under s. 287.11 (2) (b), Stats. In establishing these goals, the rule focuses on materials collected for recycling from single-family and two- to four-unit residences and is silent on the recycling of materials by commercial, retail, industrial, and governmental facilities. See s. NR 544.20 (1) (b) and the definition of "baseline recycling rate" in s. NR 544.21 (3). The authority for the department to base the goals for the pilot program upon materials recycled only from single-family and two-unit to four-unit residences is not apparent.

2. Form, Style and Placement in Administrative Code

a. Since the sections in the administrative code being created by the rule, ss. NR 544.20 to 544.27, focus upon a single subject, the pilot program for alternate method of compliance, the department should consider reorganizing ch. NR 544 into subchapters and placing the pilot program provisions in a new subchapter.

b. In s. NR 544.22 (2), "will not" should not be used to express a prohibition. [See s. 1.01 (2), Manual.] Similarly, see the use of "will not" in the prohibition in the last sentence in s. NR 544.23 (3).

c. The preferred drafting style is to draft in the singular. This style was not followed in a number of provisions in the rule, including ss. NR 544.22 (2), 544.23 (1), and 544.25 (1).

d. The titles for s. NR 544.24 (3) and (4) should be the same size as the titles for subs. (1) and (2). The entire rule should be reviewed for occurrences of this problem.

e. The rule should specify where the department wishes to place Table 2 in the administrative code. For example, the table could be placed following the reference to the table in s. NR 544.23 (2) (a) 1. and 2., or after s. NR 544.27.

f. In s. NR 544.25 (2) (intro.), "all of the following" should be inserted before the colon.

4. Adequacy of References to Related Statutes, Rules and Forms

In the analysis accompanying the rule, the reference to the statute providing the authority for this rule-making should be to s. 287.11 (4) (a).

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The phrase "as defined in s. NR 544.21 (3)" in s. NR 544.20 (1) (b) is redundant and should be deleted.

b. The specification of a goal for a responsible unit's pilot program in s. NR 544.20 (1) (b) would be clearer if it specified the relation of the annual recycling rate to the baseline recycling rate. For example, does the department intend that the goal be that each year the annual recycling rate exceed the responsible unit's baseline recycling rate?

c. In the definition of "baseline recycling rate" in s. NR 544.21 (3), the "a" term is an annual tonnage averaged over the past three years before participation in the pilot program whereas the "b" term is the tonnage in the immediate past year before participation in the pilot program. To ensure the specification of a meaningful formula for the baseline recycling rate, both of these terms should be based on the same period of time, either data averaged over the specified three years or data from the immediate past year.

d. In s. NR 544.21 (4), the phrase "gains approval by the department" is awkward. A simpler and more direct phrase would be "the department selects."

e. The use of the phrase "as stated in s. NR 544.04" in s. NR 544.22 (1) and (2) is potentially ambiguous. An example of a clearer phrase would be "required under s. NR 544.04."

f. Section NR 544.22 (1) indicates that a responsible unit that maintains an effective recycling program shall be eligible to apply but does not state what a qualified responsible unit is applying for since the titles to ss. NR 544.22 and 544.22 (1) are not part of the substance of the rule. [See s. 1.05 (3) (a), Manual.] A clearer alternative would be to state that an eligible responsible unit "may apply to participate in the pilot program."

g. The text of s. NR 544.23 (1) refers to multiple forms whereas the note following sub. (1) refers to a single form. The department should make these references consistent. Also, will the form be available on the Internet? If so, the note should indicate this.

h. Section NR 544.23 (1) should explain what the department will do if there are still an insufficient number of qualified applicants after the department has already extended the application deadline for 90 days under this subsection.

i. The difference between an operator and a service provider in s. NR 544.23 (2) (d) 1. is not clear. If this difference is substantive, then the department should clarify those differences. Otherwise, one term would suffice.

j. In s. NR 544.23 (2) (f), the reason that changes to local ordinances are "necessary" is unclear. Can the department be more specific?

k. Section NR 544.24 (4) specifies that the department will provide a pilot program agreement to an applicant selected to participate in the pilot program. If an agreement will establish substantive requirements that the department will impose on a participant, the rules should identify the elements of an agreement to ensure consistent contents for different agreements. For example, will an agreement require that changes in local ordinances identified under s. NR 544.23 (2) (f) be implemented?

l. The independent clause in s. NR 544.27 (2) is wordy and incorrect word usage. An example of clearer text would be "The department may terminate the participation of a responsible unit in the pilot program . . . ."

m. Section NR 544.27 (2) specifies the department may terminate a pilot program participant if the department determines that the participant does not meet the requirements of s. 287.11 (4), Stats. Does the department intend to be able to terminate participation in the pilot program based upon a participant not complying with either ss. NR 544.20 to 544.27 or with the participant's pilot program agreement entered into under s. NR 544.24 (4)? If so, though these requirements legally flow from s. 287.11 (4), Stats., the rule would be clearer if the department explicitly identified these other grounds for terminating a responsible unit's participation in the pilot program in s. NR 544.27 (2).

n. The department should review the entire rule to ensure that the uses of articles in the rule are grammatically correct. See, for example, the use of "the," rather than "a" or "an," before "applicant," "responsible unit," or "pilot program participant" in ss. NR 544.23 (2) (intro.) and (3) and 544.27 (1).